No. 34.

Brief of Herbert for P. E.

Filed Sept. 20, 1897.

Supreme Court of the United States.

October Term, A. D., 1896.

NO. ~~10~~ 34.

A. B. ROFF, Plaintiff in Error.

vs.

LOUISA BURNEY, as Administratrix of B. C. Burney, deceased, Defendant in Error.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF PLAINTIFF IN ERROR.

C. L. HERBERT,
Counsel for A. B. Roff, Plaintiff in Error.

Supreme Court of the United States.

October Term, A. D., 1896.

NO. 910.

A. B. ROFF, Plaintiff in Error.

vs.

LOUISA BURNEY, as Administratrix of B. C. Burney, deceased, Defendant in Error.

IN ERROR TO THE UNITED STATES COURT IN THE INDIAN TERRITORY.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE:

August 28, 1893, plaintiff in error, hereinafter called plaintiff, filed in the U. S. court in the Indian Territory, Third Judicial Division, his com-

plaint against defendant in error, Louisa Burney, as administratrix of the estate of B. C. Burney, deceased. Nov. 6, 1892, plaintiff filed in said court, his amended complaint, alleging, in substance, "That both plaintiff and defendant reside in the Chickasaw Nation, Indian Territory; that plaintiff, A. B. Roff, is a natural born citizen of the United States of America; that he has never in any way renounced his allegiance to said United States government, and he has never taken the oath of allegiance to any foreign government of any kind whatsoever, of any foreign king, potentate or ruler of any such government; that plaintiff has been, and is yet, a citizen of the United States. As aforesaid, plaintiff states that in the year 1857, the legislature of the Chickasaw Nation passed an act wherein and by reason whereof, the heirs and nephew of Wm. H. Bourland, to-wit:

Amanda Bourland, Matilda Bourland, Gordentia Bourland and Run Hannah Bourland, were adopted as citizens of the Chickasaw Nation.

Now, this plaintiff states and charges the truth to be that on the 7th day of October, 1896, the legislature of the Chickasaw Nation passed an act wherein and by reason and virtue whereof, the children and nephew of Wm. H. Bourland, to-wit:

Amanda Bourland, Matilda Bourland, Gordentia Bourland and Run Hannah Bourland, were adopted as citizens of said Chickasaw Nation and members and citizens of the tribe of Chickasaw In-

dians, a copy of said act of said Chickasaw legislature is hereto annexed, marked "Exhibii A," and made a part thereof; that said act was but a confirmation of said act of 1857, aforesaid, Now, plaintiff states that said children and nephew of said Wm. H. Bourland, aforesaid, by reason and by virtue of said act of said Chickasaw legislature become and were, and ever since said year, 1857, have been members of the tribe of Chickasaw Indians and citizens of said Chickasaw Nation and as such were, and ever since said date have been entitled to all the rights, immunities and privileges of a Chickasaw Indian by blood guaranteed unto him by the constitution and laws of the United States, the constitution and laws of the Chickasaw Nation, and the treaties between the government of the United States and said tribe of Chickasaw Indians and the tribe of Choctaw Indians.

Plaintiff states that on or about the 11th day of November, 1867, that according to the laws, customs and usages of said tribe of Chickasaw Indians, and of said Chickasaw government, he was duly and legally married to the said Matildia Bourland (adopted by said act of said legislature as a citizen of said Nation, and member of said tribe, as aforesaid,) and that by reason an virtue of said inter-marriage with said Matilda Bourland, under the constitution and laws of the United States, the constitution and laws of said Chickasaw Nation, and the treaties between the United States government and the Chickasaw and Choctaw tribes of Indians, he became and was, and

ever since said date has been a member of the tribe of Chickasaw Indians and a citizen of the Chickasaw government, and entitled to all the rights, privileges and immunities of a Chickasaw Indian by blood; but plaintiff alleges that, contrary to the constitution and laws of the United States, and contrary to the constitution and laws of said Chickasaw Nation, and contrary to the treaties between the United States and the Chickasaw and Choctaw tribes of Indians, on the 13th day of October, 1883, said Chickasaw legislature passed another and different act wherein and by reason and by virtue whereof it is attempted to repeal said act of said legislature of October 7, 1876, and said act of 1857 and to disclaim, renounce and repudiate the citizenship of said Bourland heirs and of this plaintiff, acquired thereunder, in the manner aforesaid, and to deny this plaintiff any right as a member of said tribe of Chickasaw Indians, or a citizen of said Chickasaw Nation, A copy of said last named act of said Chickasaw legislature is hereto annexed marked "Exhibit A" and made a part hereof.

Now, this plaintiff states and charges the truth to be that ever since the passage of said last named act the said Chickasaw government, and all the courts and officials thereof, have refused to recognize this plaintiff as a member of said tribe of said Chickasaw Indians, or as a citizen of said Chickasaw government, and, that, hitherto, since said date all the courts of the Chickasaw government have refused to entertain jurisdiction of any

controversy between this plaintiff and a member of said tribe of Chicksaw Indians, and that they do yet refuse to entertain jurisdiction of such controversies. [R. 1 and 2.]

Alleging, further, that the defendant, Louisa Burney, (administratrix of her deceased husband) is a member of the tribe of Chickasaw Indians by blood. And, also, declaring upon a debt owing by said estate to the plaintiff, which had been presented to and disallowed by defendant, as such administratrix. [R. 2 and 3.]

To this complaint the defendant interposed the following "demur and plea to the jurisdiction," to-wit:

"Now comes the defendant, and for answer, appearing only for the purpose of controverting the jurisdiction of this court, and says that the plaintiff can not recover in this cause because she says that said complaint shows that said B. C. Burney was, during his life time, a member of the Chickasaw tribe of Indians, and that this defendant is a member of said Chickasaw tribe of Indians, and is administering upon said estate in the tribal courts of said Chickasaw Nation, and that the plaintiff is a member of said Chickasaw tribe of Indians, by marriage, and does not show that plaintiff has ever made an effort to have the tribal courts of the Chickasaw Nation entertain this suit, upon which she prays the judgment of the court." [R. 5.]

On Nov. 21, 1894, this demur and plea to the jurisdiction was presented to, and was

sustained by the trial court, who rendered judgement in favor of defendant dismissing the cause for want of jurisdiction; and as plaintiff excused to the court's decision, he was allowed sixty days to prepare his bill of exceptions. (R. 6.) The bill of exception was signed and approved January 9, 1895, and was filed with clerk of the trial court January 11, 1895. (R. 6.) The bill of exceptions, which contains so much of the record as is necessary to advise this court of the jurisdictional question involved, is, in writing, by counsel for the defendant, admitted to be correct. (R. 6.)

Petition for writ of error was filed January 7, 1895. (R. 7.) Assignments of error were filed same day. (R. 7 and 8.) Original writ of error issued January 9, 1895, and a true copy of same was lodged wite clerk of the trial court. (R. 9 and 11.)

Citation in error issued January 9, 1895, the service of which was accepted by the defendant in error. (R. 9.) Superaedeas bond was approved by the trial judge and filed with clerk January 7, 1895, (R. 10.) and this cause is brought to this court for revision and review solely on the aforesaid jurisdiction question. The following errors are assigned to the decision of the trial court in sustaining the demurer to, and in dismissing the complaint of the plaintiff:

1. "The plaintiff, in his complaint, having alleged that he was a native born citizeu of the United States, and had never renounced his allegiance to said government, or taken the oath of

allegiance to any foreign government of any kind whatsoever, the trial court erred in sustaining the defendant's plea of the jurisdiction of the court and dismissing this cause on the ground that the complaint further alleged that plaintiff was also a member of the tribe of Chickasaw Indians by inter-marriage, and the defendant a member of such tribe by blood."

2. "The complaint having alleged that the tribal courts of the Chickasaw Nation and the legislature of said nation, by act passed, repudiated and disclaimed the citizenship of A. B. Roff, the court erred in holding that it had no jurisdiction of the controversy between plaintiff and defendant, because the complaint further alleges that plaintiff and defendant were members of tee same tribe of Indians." (R. 7 and 8.)

These two assignments of error will be considered together. The complaint shows beyond question that A. B. Roff is a natural born citizen of the United States and is yet a citizen of the United States because he has never renounced his allegiance to said government or taken an oath of allegiance to any other government and that he resides within its territorial limits. [R. 1.] It also, shows by virtue of his marriage to Matilda Bourland, a member of the tribe of Chickasaw Indians, November 11, 1867, said Roff became a member of the tribe of Chickasaw Indians. [R. 2.] That the defendant is a member, by blood, of the said tribe of Indians. [R. 3.] It further shows affirmatively that the

the courts of the Chickasaw Nation repudiate Roff's Indian citizenship, and deny him the right to sue members of the tribe of Chickasaw Indians and by legislation said Chickasaw government have attempted to repudiate his Chickasaw citizenship. Article 38 of the treaty of 1866 between the Choctaw and Chickasaw Indians and the United States, reads:

"Every white person, who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed as a member of said Nation * * * * in all respects as though he was a native Choctaw or Chickasaw." [See Vol. 14 U. S. Statutes at large, p. 779.] It will be seen by this article of of the treaty there are three kinds or classes of Choctaw and Chickasaw Indians recognized, viz: By blood, by legislative adoption, and by intermarriage. Under the allegations in the complaint, Matilda Bourland, (to whom Roff was married,) was a Chickasaw by legislative adoption, and Roff a Chickasaw by inter-marriage. March 1, 1889, congress passed an act "to establish a United States court in the Indian Territory, and for other purposes." [See, Vol. 25 U. S. statute at large p. 783.] Sect. 6 of that act, [p. 784,] reads:

"That the court hereby established shall have jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any state or territory therein, and

any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed shall amount to one hundred dollas or more: Provided, that nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only." Under this act there can be no question but that the United States court in the Indian Territory had jurisdiction of the controversy between A. B. Roff, a Chickasaw by marriage and Mrs. Louisa Burney, a Chickasaw by blood; but it is contended that this act was so amended by act of May 2, 1890, [26 U. S. stat. at large, p. 81] as to deprive said court of jurisdiction of said controversy. Section 31 of said last named act [p. 94] reads:

"That certain general laws of the State of Arkansas, in force at the close of the session of the general assembly of that State, of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until congress shall otherwise provide, that is to say, the provisions of the said General Statutes of Arkansas, relating to administration, chapter 1; * * * * to bills of exchange and promisory notes, chapter 14.

* * * * * *

The constitution of the United States and all general laws of the United States, which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the district of Columbia, and all laws relating to National Banking Associations shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption are the sole parties."

The latter part of Section 30 of same act, [Idem. page 94,] contains this proviso, viz: "Provided, however, that the judicial tribunal of the Indian Nation, shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extend over and put in force in said Indian Territory by this act shall not apply." The act of 1889 above cited, conferring jurisdiction upon said United States court, as to persons, except as limited by sections 30 and 31 of the act of 1890, is still in force in the Indian Territory, and, we contend that if Roff is a member of the tribe of Chickasaw Indians by intermarriage, [and not a member thereof by treaty, blood or adoption] the limitation placed upon the act of 1889 by the act of

1890 does not deprive said United States court of jurisdiction of a controversy between himself, as an intermarried Chickasaw, and a member of said tribe by treaty, blood or adoption. To correctly determine this question it will be necessary to consider what is meant by "member of the tribe by treaty, blood or adoption." Does the member of said tribe, who acquires his membership or citizenship thereof by intermarriage come within the meaning and definition of a "member by treaty" a "member by blood" or a "member by adoption?" If yes, then under the technical sonstruction of the act of 1890, the trial court had no jurisdiction of the controversy presented by the record; if the negative answer is given then the said United States court had jurisdiction by the express terms of the act of 1889.

What then is meant by the language, a "member by treaty?" A treaty is defined to be a "contract between two or more independent nations." [See Anderson's Dictionary of Law, page 1051, "Treaty;" Whitney vs. Robertson, 124 U. S. 194.] A treaty, "by the general law of nations, is in the nature of a contract between two nations, not a legislative act." [Anderson's Dictionary of Law, page 1051, "Treaty;" Foster vs. Neilson, 2 Pet. 314.]

We contend that a member of any of the five civilized tribes by "treaty" is of African descent, who resided in the Indian Territory, at the date of the emancipation of the slaves, and that the treaties, made by the United States with the five

civilized tribes sustain the contention. By article 3 of the treaty of 1866, between the Choctaws and Chickasaws, the United States government held back from said tribes $300,000.00 until the "legislatures of the Choctaw and Chickasaw Nations respectively shall have made such laws, rules and regulations as may be necessary to give all persons of African descent resident in the said Nations at the treaty of Ft. Smith, and their descendants heretofore held in slavery among said Nations, all the rights, privileges and immunities, including the right of suffrage of citizens of said Nations, except in annuities &c." 14 Statutes at large 769.

When ratified by the Choctaw or Chickasaw legislature said persons of African descent became members of the tribe ratifying the same under this section of the treaty the Chickasaws never adopted their freedmen, but on May 21, 1883, the Choctaws adopted their freedmen by legislative act, 22 U. S. Statutes at Large, 68, 72, 23 U. S. Statutes at large 362, 366; Lucas vs. U. S. 163 U. S. 282, [Lawyers Co. Op. Ed., bottom page 282.] It, therefore, follows without reason that the Choctaw freedmen are members of the Choctaw tribe by "treaty."

Article 9 of the treaty of 1866 between the United States and the Cherokee Indians, (14 Stat. at large, 801,) reads: * * * "They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the

country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their decendants, shall have all the rights of native Cherokees." This section of said treaty made the Cherokee freedmen, residents of that Nation, members of the tribe of Cherokee Indians by treaty. Alberty vs. U. S., 162 U. S., 1051 (Law Ed. bottom page.) By Art. 2, treaty of 1866 of United States with the Creek Indians, (14 Stat. at large,786,) the persons of African descent are made members of the Creek tribe of Indians by treaty with all the privileges of a native Creek Indian. By article 2 of treaty of 1866, between the United States and the Seminole Indians, (14 Stat. at large 756,) persons of African descent and blood are made members of the tribe of Seminoles Indians by treaty.

By an examination of these treaties it will be seen that it was intended by the treaty makers that all persons of African descent, former slaves of the Cherokees, Creeks and Seminoles, residing in said Natians, by reason of said treaties, ipso facto become members of the tribe to which their former masters were members; and the persons of African descent, of the same status, in the Choctaw or Chickasaw Nations were to become members of said tribes when such treaty should be confirmed by the legislatures of said Nations, respectively.

Roff then was not, and is not a member of the of the Chickasaw tribe by treaty, if our conten-

tion be correct. The complaint shows he was not a member of such tribe by nativety. Then was he a member by adoption? Unquestionably a member of the tribe of Choctaw or Chickasaw Indians by adoption is he who has been "adopted by the legislative authorities" of such Nations. See article 38 treaty of 1866 of United States with Choctaws and Chickasaws. This article 38 of said treaty of 1866 clearly distinguishes the "member of said tribes by legislative adoption" from the member by inter-marriage." It was not intended by the act of Congress of 1890 to deprive the United States court in the Indian Territory of jurisdiction of a controversy between a white man, a member of the tribe by inter-marriage, and a member of said tribe by legislative adoption, treaty or nativity. Congress was then too well acquainted with the status of its own citizens residing in this territorty who had married members of said tribe and thereby acquired rights of Indian citizens, and too well advised that the white inter-married members of the Chickasaw tribe had by an amendment of the Chickasaw constitution been disfranchised, and by the "powers that be" had been much and unjustly discriminated against in the tribal courts. Roff's case is a fair illustration of this doctrine. He asserts against a Chickasaw by nativity a liquidated demand but the tribal court refuses to entertain jurisdiction of his cause of action—they have deprived themselves of the jurisdiction—they rely upon their own void

legislation wherein they attempt to legislate away his vested right of Chickasaw citizenship. The United States court is then resorted to, and, by that tribunal he is told that he is a Chickasaw by inter-marriage and must not deprive the tribal courts of their jurisdiction. He pleads and is prepared to prove the tribal courts will not entertain jurisdiction of a controversy between himself and other members of the tribe; that he was born a citizen of the United States, has never renounced his allegiences thereto, and has never taken an oath of allegiance to any other government, etc., but all to no avail! He is declared to be a kind of quasi citizen of the United States, and a white Chickasaw Indian without a forum for the ledress of his grievances.

The United States, as guardian of the Chickasaws, through its judicery in unmistakable terms says to him: "Although a respected citizen of the United States and a member of the Chickasaw tribe, you are, nevertheless, an outcast, a political non-entity—a man without a forum, whose civil rights by the Chickasaw Indians may be invaded with impunity.

Suppose it be held by this court that Roff is, under the allegations in the complaint, a member of the tribe of Chickasaw Indians by treaty or adoption, and that the tribal court had jurisdiction of the controversy between he and Mrs. Burney.

Can it be said that the action of the United States court in exercising jurisdiction would "de-

prive" the tribal court of its jurisdiction? That court is deprived of nothing. It simply refuses to entertain jurisdiction of the controversy, and Roff by reason of his dual citizenship resorts to the United States court to enforce the collection of his indebetedness against an Indian by blood.

By act of Congress, May 2, 1890, dual citizenship is encouraged and expressly provided for. Section 43 of that act provides, "That any member of any Indian tribe or nation residing in the Indian Territory may apply to the United States court therein to become a citizen of the United States, and such court shall have jurisdiction thereof and shall hear and determine such application as provided in the Statutes of the United States; * * * * Provided, that the Indians who became citizens of the United States under the provisions of this act do not forfeit or lose any rights or priviliges they enjoy or are entitled to as members of the tribe or Nation to which they belong," 26 Statutes at Large, 99. What is the meaning of this act of congress? Is it not intended to give to the member of any of the Indian tribes, who resides in the Indian Territory, [now, and at date of the act, composed of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Nations,] a right to acquire dual citizenship by complying with the provision of that act? He is to remain a member of his tribe and yet he becomes a citizen of the United States; he forfeits no right or privilege he has as an Indian; that is to say, he has a right to vote, hold office, acquire and own

property, &c, &c, as a member of the tribe, and has the right to sue another Indian, member of same tribe, in the tribal courts for the redress of his grievances, yet, will it be seriously contended that if the tribal courts, because he is a citizen of the United States, refuse to entertain jurisdiction of a suit by him filed against another member of his tribe, that the United States court in the Indian Territory, recognizing him as a citizen of the United States, would deny him jurisdiction because forsooth he still enjoyed the rights and privileges of an Indian?

If such a construction of the act be correct, then the act of Congress is an absurdity, and tends to mislead the Indian, and will result in great devastation to his personal and property rights.

If Roff was born a citizen of the United States and, as alleged, has never renounced his allegiance thereto, and has never taken the oath of allegiance to the Chickasaw government and yet resides within the territorial limits of the general government, we submit he is still a citizen of the United States and is entitled to enjoy the dual citizenship provided for in the act without complying with the terms thereof. His residence among the Chickasaws, and his Chickasaw citizenship is not a renunciation of his citizenship as an American citizen.

In Elk vs. Wilkins, (112 U. S. 643,) Law. Ed. bottom page, this court held that an Indian, born a member of one of the Indan tribes, which still exists, cannot voluntarily expatrate himself

from his tribe and become a citizen of the United States without the action or assent of the United States government.

The act of Congress, above cited, in our opinion, therefore did not intend that any member of the tribe, other than Indians by birth would take the oath of allegiance to the United States government. Certainly the white man, by birth a citizen of the United States, who had never renounced his allegiance to that government, and who had never taken the oath of allegiance to any other government, a bona fide resident of the general government, was not expected to take the oath of allegiance to the U. S. government, simply because he had married, (as Roff did,) a member of the tribe of Chickasaw Indians.

In Talbot vs. Janson, (3 Dallas, p. 553, Law Ed. bottom page,) this court said: "We are undoubtedly to consider him a citizen of the United States. Admitting he had a right to expatriate himself, without any law prescribing the method of his doing so, we surely must have some evidence that he had done it. There is none, but that he went to the West Indies, and took an oath to the French Republic, and became a citizen there. I do not think that merely taking such an oath, and being admitted a citizen there, in itself, is evidence of a bona fide expatriation, or completely discharges the obligations he owes to his own country." Section 1992 Rev. Statutes U. S. p. 350, reads: "All persons born in the United States and not subject to any foreign power, excluding

Indians not taxed, are declared to be citizens of the United States." If under the local laws of the Chickasaw government Roff had been required to take an oath of allegiance to that government, and renounce his allegince to the United States government, as a condition precedent to his marriage to Matilda Bourland, and had he taken such oath, we concede he would have then forfeited his citizenship as a citizen of the United States. The complaint, however, alleges that he married according to the local laws of the Chickasaw Nation, etc., and that he has never taken such oath. We respectfully submit that if Roff was now in a foreign country and was being "unjustly deprived of his liberty" by authority of said government, that the president, when advised of the status of Roff's citizenship would promptly demand his release in accordance with Sec. 2001 of Rev. Stat. of the U. S., notwithstanding Roff had previously married one of the wards of the government and thereby acquired the rights of a Chickasaw Indian.

We believe the trial court had jurisdiction of the subject matter and the p rties to the controversy in the case presented by the record, and that it is contrary to the spirit and intention of our American jurisprudence to deprive a citizen of the general government, male or female, of a forum in which to redress his grievances although he or she may have married a Chickasaw Indian and become a member of that tribe and for the reasons hereinbefore stated would most respect-

fully request that this case be reversed and remanded for trial anew.

Respectfully Submitted,

C. L. HERBERT,

Counsel for A. B. Roff, Plaintiff in Error.